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09/740,804	12/21/2000	Robert Curley	O-226	6420

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Kraguljac & Kalnay, LLC - Oracle
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Summit One, Suite 510
Independence, OH 44131

EXAMINER

NGUYEN, THANH T

ART UNIT	PAPER NUMBER
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ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

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In re Application of: Robert CURLEY, et al.
Application No. 09/740,804
Filed: Dec 21, 2000
For: METHOD AND APPARATUS FOR
PROVIDING MEASUREMENT, AND
UTILIZATION OF, NETWORK LATENCY
IN TRANSACTION-BASED PROTOCOLS

**DECISION ON PETITION
UNDER 37 C.F.R. § 1.181**

This is a decision on the petition filed July 21, 2010 under 37 CFR § 1.181 to invoke Supervisory Authority and require the Examiner to withdraw the Finality of office action mailed May 18, 2010.

The petition is **GRANTED**.

RELEVANT PROSECUTION HISTORY

May 20, 2004	The Examiner issued a non final rejection rejecting claims 1, 3-14, 15-27, and 29-35 under 35 U.S.C. 102(e) as being anticipated by Pruthi (PGPUB 2002/0105911). Claims 1, 15, 19, 20, 26, 27, 28, and 29 are independent claims.
Aug 16, 2004	(copy filed with petition of Feb 18, 2005) An amendment was filed by the applicant amending independent claims 1, 15, 20, 26, 28 and 19; dependent claims were amended by virtue of their independency. Independent claims 19 and 27 remained unchanged.
May 18, 2010	The Examiner issued an office action finally rejected claims 1, 3-14, 15-27, and 29-35 under 35 U.S.C. 103(a) as being unpatentable over Pruthi (PGPUB 2002/0105911) in view of Sweet (PGPUB 2003/0115266).
July 21, 2010	The instant petition was filed requesting withdrawing the Finality of the action mailed May 18, 2010.

REGULATIONS AND PRACTICE

MPEP 706.07(a) states in part that:

Under present practice, second or any subsequent action on the merits shall be made final, except where the examiner introduces a new ground of rejection not necessitated by amendment of the application by the applicant, whether or not the prior art is already of record.

MPEP 706.07(d) states in part that:

If, on request by applicant for reconsideration, the primary examiner finds the final rejection to have been premature, he or she should withdraw the finality of the rejection.

Once the finality of the Office action has been withdrawn, the next Office action may be made final if the conditions set forth in MPEP § 706.07(a) are met.

MPEP 707.07(f) states in part that:

Where the applicant traverses any rejection, *the examiner should*, if he or she repeats the rejection, take note of the applicant's argument and answer the substance of it.

MPEP § 1201 states, in part:

The line of demarcation between appealable matters for the Board of Patent Appeals and Interferences (Board) and petitionable matters for the Director of the U.S. Patent and Trademark Office (Director) should be carefully observed. The Board will not ordinarily hear a question that should be decided by the Director on petition, and the Director will not ordinarily entertain a petition where the question presented is a matter appealable to the Board ...

37 C.F.R. § 1.181(f) states, in part:

The mere filing of *a petition will not stay any period for reply* that may be running against the application, nor act as a stay of other proceedings...

DECISION

A review of the file history indicates in the amendment filed August 16, 2004, claims 19 and 27 remained unchanged and applicant's arguments against the rejection of claims 19 and 27 as being anticipated by the Pruthi reference as follow:

Claim 19 discloses in part "using IP Header sequence number to help distinguish out-of-order TCP packets from retransmitted TCP data packets ...". The Examiner stated that Pruthi discloses the same, however, a review of Pruthi (specifically paragraph 47) reveals that Pruthi discloses receiving out-

of-order ATM cells and orienting them into the correct order. Pruthi fails to disclose or suggest a method for determining communications protocol latency that includes distinguishing out-of-order packets from retransmitted packets. Accordingly, claim 19 is believed allowable over Pruthi.

Claim 27 discloses a method of determining whether web page content is static or dynamic. The Examiner stated that Pruthi discloses the same at paragraphs 122 through 131. A review of Pruthi reveals that Pruthi fails to disclose or suggest the determination of whether web page content is static or dynamic. Accordingly, claim 27 is believed allowable over Pruthi.

In the Final office action of May 18, 2010, claims 19 and 27 appear to be rejected under 35 U.S.C. 103(a) as being unpatentable over Pruthi (PGPUB 2002/0105911) in view of Sweet (PGPUB 2003/0115266). No response to applicant's arguments was presented and the examiner indicated new ground of rejection was necessitated by applicant's amendment.

Thus the finality of the action mailed May 18, 2010 is improper.

For the above stated reasons, the petition is **GRANTED**.

The Finality of the Office action mailed May 18, 2010 is hereby removed and the action has been changed to Non-Final. The amendment filed on July 22, 2010 will be treated as a response to non final action.

Any inquiry concerning this decision should be directed to Kim Huynh, whose telephone number is (571) 272-4147.

/Nancy Le/

Nancy Le, Director
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